YAMAMORI (HONG KONG) LTD.

v.

BORNEO HOTEL SDN. BHD. & ANOR.

HIGH COURT BORNEO, TAWAU
SYED AHMAD IDID JC
[CIVIL SUIT NO. T. 66 OF 1989]
12 JULY 1991

COMPANY LAW: *Appointment of provisional liquidator by a foreign Court - Effect on the powers of directors - Whether can retain solicitors - Liability of liquidator to be determined by law of country which appointed him.*

LEGAL PROFESSION: *Authority of solicitors - Whether ends when provisional liquidator is appointed - Power of directors - Rules of the High Court 1980, O. 92 r. 4.*

The plaintiff sought various declarations. However, before the hearing of the action could commence, the defendants applied under O. 92 r. 4 of the Rules of the High Court 1980 (RHC) for an order that the plaintiff's proceedings be stayed for want of authority on the part of the plaintiff's solicitors to continue the conduct of the proceedings.

As a result of the 2nd defendant's application, the Hong Kong High Court High Court on 28 January 1991 appointed the official receiver as the provisional liquidator of the plaintiff. As a result of this order, disputes arose as to whether plaintiff's solicitors ceased to have any authority to represent the plaintiff and whether the plaintiff can continue with this action.

The plaintiff contended that despite the appointment of the provisional liquidator by the Hong Kong High Court, the authority of solicitors' engaged in the instant case and another case pending in Kota Kinabalu should continue since there has been no evidence of termination.

The defendants argued that, based on B's affidavit, under Hong Kong law, the appointment of a provisional liquidator displaced the directors of the company and placed the affairs of the company under the provisional liquidator. It was therefore argued that the authority of the company's directors to deal with the assets of the company abroad and to exercise any authority on behalf of the company abroad would be terminated.

The plaintiff's solicitors argued that the disablement of the company's directors does not *ipso facto* render invalid all prior acts of the directors. It was also contended that in the absence of positive evidence of termination by the provisional liquidator of the solicitor's retainer as solicitors, they continued to act as solicitors.

Another issue was whether the order of the Hong Kong High Court of 28 January 1991 had any extra-territorial effect in Malaysia.

Held:

[1] B's exposition of the relevant laws of Hong Kong was of assistance to the Court.

[2] A provisional liquidator is provisional in the sense that the appointment operates to protect the property for an equal distribution in the event of an order for compulsory winding up. In this case, the provisional liquidator was the only person competent to give any instruction; however he has not done so.

[3] The appointment of the provisional liquidator automatically puts an end to the authority of the company's directors to instruct solicitors to represent it.

[4] If a principal appoints an agent in a particular country, the authority of the agent *vis-a-vis* the principal as well as the terms of his appointment, his liability for removal is governed by the law of such country. In the instant case, the position has to be determined in accordance with Hong Kong law. It was up to the Hong Kong Court to determine the appointment of the provisional liquidator and so long as he is in existence, the powers of the directors are no longer exercisable by them.

[5] Once the liquidator has been appointed, the authority of the company directors, and consequently of its servants, to manage the affairs of the company and to deal with its assets abroad is revoked.

[Defendants' application to stay suit allowed with costs.]

Cases referred to:
Bank of Ethiopia v. National Bank of Egypt & Liguori [1937] Ch 513 ***(cit)***
Goldsbrough Mort v. Doyle [1893] 6 QLJ 1 ***(foll)***
Haw Par Bros. (Pte) Ltd. v. Dato' Ah Kow [1973] 1 MLJ 169 ***(cit)***
John Shaw & Sons (Salford) Ltd. v. Peter Shaw & John Shaw [1935] 2 KB 113 ***(cit)***
Piang Hong Yon v. Syarikat Seri Berlian Sdn. Bhd. [1983] CLJ (Rep) 324 ***(cons)***
R. v. Secretary of State for India in Council & Ors. Ex Parte Ezekiel [1941] Vol. 2 All ER 546 ***(cit)***
Re ABC Coupler & Engineering Co. Ltd. (No. 3) [1970] 1 WLR 702 ***(cit)***
Re Mawcon Ltd. [1969] 1 All ER 188 ***(foll)***
Re Oriental Bank, ex parte Guillemin [1884] 28 Ch D 634 ***(foll)***
Re Oriental Inland Steam Co. [1874] 9 Ch App 557 ***(cons)***
Re Union Accident Insurance Co. Ltd. [1972] 1 All ER 1105 ***(cit)***
Richmond v. Branson & Son [1914] 1 Ch 968 ***(cit)***
Russian Commercial & Industrial Bank v. Comptoir D'Escompte De Mulhouse [1925] AC 112 ***(cit)***
Sarawak Building Supplies Sdn. Bhd. v. Director of Forests & Ors. [1991] 1 MLJ 211; [1991] 3 CLJ (Rep) 706 ***(cit)***
Syawal Enterprise Sdn. Bhd. & Anor. v. Dayadiri Sdn. Bhd. [1990] 2 CLJ (Rep) 165 ***(dist)***
U. Viswalingam v. S. Viswalingam [1980] 1 MLJ 10 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 92 r. 4

Other sources referred to:
Strouds' Judicial Dictionary
The Conflict of Laws 11th Edn., Vol. 2 1987, by Dicey & Morris
The Law of Company Liquidation 3rd Edn., by B.H. McPherson

For the plaintiff - R.R. Sethu and Egusra bte Ali; M/s. Lawrence Chai & Peter Soong
For the 1st defendant - W.S.W. Davidson assisted by Alex Decena and Norbert Yapp; M/s. Jayasuriya Kah & Co.
For the 2nd Defendant - Cecil Abraham assisted by Raymond Wong; M/s. Nicholas Fung Tokuzip & Co.

JUDGMENT

Syed Ahmad Idid JC:

1. (i) The plaintiff caused to be issued the writ of summons on 4 December 1989 and prayed for:

(1) a declaration that the 1st, 2nd, 3rd and 4th charges over certain lands were invalid and that the charges be ordered cancelled;

(2) an order that 2nd defendant delivers to 1st defendant the relevant issue document of title to the said lands free from encumbrances and the entries duly cancelled;

(3) a declaration that the Power of Attorney was invalid and unenforceable against the 1st defendant and that its revocation on 2 October 1987 was valid and for an order that 2nd defendant delivers the original Power of Attorney to the 1st defendant;

(4) an order that 2nd defendant indemnify 1st defendant against damage or losses by its exercise of the powers under the said Power of Attorney;

(5) an injunction to restrain the 2nd defendant, its agents and/or servants from exercising its powers including by way of sale or foreclosure of the said property under any of the four charges;

(6) an injunction restraining the 2nd defendant by itself or agents and/or servants from exercising, assigning, or transferring to any person any of the rights or powers conferred by or contained in the said Power of Attorney;

(7) damages;

(8) other reliefs or orders;

(9) and costs of the suit.

(ii) The month of April 1991 was allocated for the trial of the main action in Tawau.

2. (i) But before the commencement of the hearing, both 1st and 2nd defendants filed a summons-in-chambers on 26 March 1991 under O. 92 r. 4 of the Rules of the High Court 1980 applying for an order that the proceedings commenced by the plaintiff in this action be stayed for want of authority on the part of the plaintiff's solicitors to continue the conduct of these proceedings on behalf of the plaintiff and for such further or other orders as the Court may deem fit and that the costs of the application be provided for.

(ii) At the outset, I saw that if there had been no challenge, this Court would presume that M/s. Lawrence Chai & Peter Soong & Co. had the necessary authority. The business of the Courts cannot be carried out if one were not entitled to presume the existence of such authority. However, the 1st and 2nd defendants have, in line with the judgments in the cases of *John Shaw & Sons (Salford) Ltd. v. Peter Shaw & John Shaw* [1935] 2 KB 113; *Russian Commercial and Industrial Bank v. Comptoir D'Escompte De Mulhouse* [1925] AC 112 and *Richmond v. Branson & Son* [1914] 1 Ch 968, filed the application to stay the action. Although there was a request for a postponement, the application was heard and completed on 29 May 1991 at Tawau.

3. (i) At the start of the hearing, Mr. Sethu of learned Counsel for the plaintiff informed the Court that the plaintiff in this action was also the plaintiff in the Kota Kinabalu High Court Civil Suit K. 524 of 1988 on which a similar application had been heard on 11 April 1991. The present action, according to Mr. Sethu, was a derivative action and no relief of any kind was sought against the 1st defendant. He then referred to the various correspondence among the three parties dated between 13 May 1991 and 22 May 1991 and confirmed that M/s. Lawrence Chai & Peter Soong & Co. had written in on 13 May 1991 for a postponement of this application.

(ii) Both Mr. Davidson and Mr. Abraham opposed the postponement of the hearing of the application. Mr. Davidson urged that this matter be heard as otherwise "the trial (referring to the dates fixed by the Court to hear the other related actions in this matter) in August could be in danger."

(iii) The Court then ruled that it will hear the application, and accordingly the parties argued and submitted.

4. Mr. Cecil Abraham, of Counsel for the 2nd defendant, referred to the affidavits of (i) Miss. Chew Mei Lee dated 22 March 1991. Miss. Lee is the Manager, Legal Affairs Department of the 2nd defendant; (ii) Mr. Mark John Bradley, a solicitor of the Supreme Court of Hong Kong and partner of M/s. Deacons dated 13 May 1991; (iii) those of Mr. Peter Soong dated 1 April 1991.

5. The facts of the matter were that on 28 January 1991, the High Court of Hong Kong in Companies (Winding-Up) No. 223 of 1990 ordered that the Official Receiver be appointed the Provisional Liquidator of the plaintiff. That was upon the application by the 2nd defendant. On that order, which was not disputed, followed a lot of disputes and arguments as to whether (a) the solicitors, that is, M/s. Lawrence Chai & Peter Soong & Co. had or ceased to have any authority to represent the plaintiff; and (b) the plaintiff can continue with this action.

6. (i) The Registrar General's Department (Official Receiver's Office) of Hong Kong wrote on 11 March 1991 to M/s. Lawrence Chai & Peter Soong in reference to both the actions in High Court suits nos: (1) K. 524 of 1988 (at Kota Kinabalu); and (2) our instant matter of T. 66 of 1989 (at Tawau). The passage had been read out by both Mr. Abraham and Mr. Sethu and it (CML-2) is reproduced here:

> The Official Receiver in this case is the Provisional Liquidator only, appointed prior to the hearing of a petition for a winding-up order which may or may not be made, and as such I cannot approve nor should I become involved in the litigation that is being contemplated. I am without funding or my own Counsel's opinion. Any litigation that you may undertake or be instructed to undertake in this case will be done entirely at your own risk, or that of the person instructing you, and without my concurrence.

(ii) Do the words "cannot approve ... without my concurrence" make it clear that the new Provisional Liquidator does not approve the continuation of the suit(s) by the solicitors in Sabah? Mr. Sethu claimed that the words "... litigation that is being contemplated ..." put these cases (that is T66/89 and K524/88) outside the ambit of the Provisional Liquidator's letter as these cases are no longer "being contemplated" but are actually in Courts. So, he argued, there is no evidence without more that M/s. Lawrence Chai & Peter Soong's authority had been terminated. Mr. Sethu also said that once the solicitors had been authorised, such authority continues until terminated by express words and not left to inferences or ambiguously worded letter such as "CML2".

7. (i) The plaintiff did not question the validity of the Hong Kong High Court order dated 28 January 1991 but only claimed that the authority of the solicitors earlier engaged in the two cases should continue despite the appointment of the Provisional Liquidator. Mr. Sethu urged the Court that as there was no positive evidence of termination, the authority of M/s. Lawrence Chai & Peter Soong & Co. should continue.

(ii) Mark John Bradley's affidavit dated 13 May 1991 at para. 4 stated:

> In the circumstances, I have been asked to state my opinion on the effect in Hong Kong law of the appointment of a Provisional Liquidator of a company incorporated in Hong Kong. Under the laws of Hong Kong, the effect of the appointment of a

Provisional Liquidator would be to displace the directors of the company and to put the company's affairs under the control of the Provisional Liquidator. The authority of the directors of the company would, under Hong Kong law, be terminated. It would follow that in Hong Kong law the authority of the company's directors to deal with assets of the company abroad and to exercise any authority on behalf of the company abroad would be terminated.

(iii) That would have settled the matter for the defendants but Mr. Sethu argued that Mr. Bradley's affidavit ought to be given no weight at all. He cited the case of *R. v. Secretary of State for India in Council & Ors. Ex Parte Ezekiel* [1941] Vol. 2 All ER 546 where the Court did not treat the affidavit of NISSIM as a statement of Indian law. Mr. Sethu argued that an expert giving evidence must be an independent person whereas Bradley being a partner in the firm of Deacons was not. Mr. Sethu then claimed that Mr. Bradley's affidavit at "para. 8 is wrong." Paragraph 8 states:

In conclusion, as the legal personality of the company is domiciled in Hong Kong, under Hong Kong law, the Provisional Liquidator represents the management of Yamamori (Hong Kong) Limited, and this capacity is without territorial limitation. The Provisional Liquidator is the universal successor to the assets of the company, and such assets would include claims of the company which are being pursued but which have not yet been concluded. The Provisional Liquidator would be the only person competent to give instructions in relation to such claims or proceedings, by way of the exercise of the powers contained in the order of 8 January 1991, which are only restricted by the terms of paras. (a) and (b) of that order of 28 January 1991 itself.

(iv) The other case cited in this respect was an English case of *U. Viswalingam v. S. Viswalingam* [1980] 1 MLJ 10. After arguments by both Mr. Sethu and Mr. Abraham, and based on the judgment of the Court of Appeal delivered by Ormrod LJ, I have decided to disregard it as not being applicable directly on the point in issue. I decided that Mr. Bradley's exposition of the relevant laws of Hong Kong was of assistance to the Court.

8. One essential consideration that parties brought to bear was the issue on extra-territoriality, that is, whether the order of 28 January 1991 had any effect in Malaysia. Mr. Sethu was of the opinion that as it was merely to appoint a Provisional Liquidator, it was not a final order to winding-up the plaintiff and as such the company continued to exist. Cited in support was *The Law of Company Liquidation* by B.H. McPherson, 3rd Edition, p. 469-E - *Commencement and Effects of Winding Up*. The Court was of the view that the Court of Appeal in *Re - Oriental Inland Steam Co.* [1874] 9 Ch App 557 correctly stated the law when it held that:

the effect of a winding up order was to deprive the company of the beneficial ownership of all its property.

9. (i) At this stage I should add that the firm of M/s. Lawrence Chai & Peter Soong & Co. took an extraordinary course of action when it sent a letter dated 4 June 1991 to the High Court Assistant Registrar, Mr. Patrick Yong, enclosing a photocopy of the judgment in *Piang Hong Yon v. Syarikat Seri Berlian Sdn. Bhd.* [1983] CLJ (Rep) 324 (FC) for my use. The arguments and submissions had been concluded in open Court a week previously on 29 May 1991. The letter and judgment were copied to M/s. Nicholas Fung Tokuzip & Co. and M/s. Jayasuriya Kah & Co. In the absence of any objection, I added that authority to the rest earlier submitted and considered it. The firm stated in its letter:

> The point we wish to emphasize is that, our retainer as solicitors of the company in December 1989 was not automatically terminated by the appointment of the provisional liquidator; THE DISABLEMENT OF THE DIRECTORS AFTER SUCH APPOINTMENT DOES NOT *IPSO FACTO* RENDER INVALID ALL THE PRIOR ACTS OF THE DIRECTORS.

(ii) I accepted the part in capitals. The other part which stated:

> In the absence of positive evidence of termination by the provisional liquidator of our retainer as solicitors we continue to be the solicitors.

has caused the problem. The latter part, in fact, was the bone of contention. The defendants said that with the appointment of the Provisional Liquidator, the directors were *ex-functus* and in consequence their agents would no longer operate. Mr. Abraham had submitted that there was no evidence by plaintiff of any authority to continue. He quoted from two cases:

(a) *Sarawak Building Supplies Sdn. Bhd. v. Director of Forests & Ors.* [1991] 1 MLJ 211.

> Held (2): The lack of authority of the solicitors to act can be challenged at any stage of the proceedings. Once the challenge has been made, the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company.

(b) *Syawal Enterprise Sdn. Bhd. & Anor. v. Dayadiri Sdn. Bhd.* [1990] 3 CLJ (Rep) 165. I did not consider this to be on all fours with the suit in our case which was instituted with proper authority.

10. (i) Was a Provisional Liquidator any different from a Liquidator? *The Law of Company Liquidation* at p. 1152 commenting on rule 178 - Effect of a Foreign Winding-up Order - provides an illustration:

> 1. X is a company incorporated in Ethiopia. An order is made for the winding up of the company in Ethiopia and a liquidator is appointed. By Ethiopian law, the effect of the appointment is that no one other than the liquidator is empowered to act on behalf of the company. A and B, who are directors of the company, authorise the commencement of proceedings in England in the name of the company without the sanction of the liquidator. The action must be stayed.

(Based on *Bank of Ethiopia v. National Bank of Egypt & Liguori* [1937] Ch 513).

(ii) Mr. Abraham urged the Court that "so far as the law is concerned, it does not make any difference between a Liquidator and a Provisional Liquidator. In *Re ABC Coupler & Engineering Co. Ltd. (No. 3)* [1970] 1 WLR 702 at p. 704, Plowman J said:

> The word 'provisional' as applied to a liquidator appears to imply a qualification not of the liquidator's powers but of the tenure of his office. He is a liquidator but his appointment is 'temporary'.

(iii) It is a finding of this Court that a Provisional Liquidator is provisional in the sense that the appointment operates to protect the property for an equal distribution in the event of an order for compulsory winding-up. That being so, the Provisional Liquidator in our instant case was the only person competent to give any instructions. He has, however, not given any such instructions.

11. Mr. Davidson, for 1st defendant, associated himself with the remarks and arguments of Mr. Abraham but added that the real issue was whether the directors had any powers to instruct Counsel. Such should be treated under agency law and the internal management of the company which matters should be governed by Hong Kong laws.

That being so, Mr. Davidson was of the opinion that the powers of the plaintiff had ceased and that the Provisional Liquidator had withdrawn the authority of the solicitors. Mr. Davidson informed the Court that Bradley's affidavit at para. 5 was founded on the judgment in *Re - Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105 at p. 1113:

> The respondents' submission was that the appointment of a provisional liquidator automatically put an end to the authority of the company's directors to instruct solicitors and Counsel to represent it and that the solicitors purporting to act on its behalf were therefore liable to pay the respondents' costs personally. It is of course well settled that on a winding-up the board of directors of a company becomes *functus officio* and its powers are assumed by the liquidator.

Pennycuick J in *Re Mawcon Ltd.* [1969] 1 All ER 188 at 192, [1969] 1 WLR 78 at 82 stated in effect that the appointment of a provisional liquidator had the same result. This Court was inclined to accept that judgment.

12. In the Kota Kinabalu Civil Suit No: K524 of 1988, the Court quoted *Haw Par Bros. (Pte) Ltd. v. Dato' Ah Kow* [1973] 1 MLJ 169 at Held (1):

> (1) an ex-director's right ceases once he is no longer a director. It follows that in principle an agent's right to inspect which has been granted by an order of Court made under s. 167(5), a right which is dependent upon his principal's right under s. 167(3), must also cease once his principal is no longer a director.

13. The arguments in Court had been fruitful and helped to dissect the issues and brought to bear on the laws and the consequences. Amidst the settling dust of the adversarial bullets, it was clear to me that:

(i) the phrase (stay of proceedings) is more frequently used as meaning to restrain or stop the proceedings definitely *Strouds' Judicial Dictionary*. What defendants wish to have is the stay of the action until the final determination of whether or not the Hong Kong action of the Official Receiver having been appointed the Provisional Liquidator of the plaintiffs terminates the services of the present solicitors and of plaintiffs' action here.

(ii) *Dicey and Morris on The Conflict of Laws* (11th Edn.,) at Vol. 2, 1987, at r. 200 says:

> An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created.

That is to say, if a principal appoints an agent in a particular country, the authority of the agent, as between him and the principal, as well as the terms of his appointment, his liability to removal from his employment, remuneration, and similar matters, is governed by the law of such country. In our case, the law of Hong Kong will govern the relationship. That being so, it was up to the Hong Kong Court to determine the appointment of the Provisional Liquidator and so long as he is in existence the powers of the directors are no longer exercisable by them.

(iii) I have said before in another case on similar facts and I now repeat:

> It never seems to be doubted that Courts will give effect to the rule that the directors of a foreign company are displaced and their authority terminated by the appointment of a Liquidator in the principal winding-up. This was recognised both in *Re Oriental Bank, ex parte Guillemin* [1884] 28 Ch D 634 and in *Goldsbrough Mort v. Doyle* [1893] 6 QLJ

1 and it would seem to follow that, once the Liquidator has been appointed, the authority of the company's directors, and consequently of its servants, to manage the company's affairs and deal with its assets abroad is also revoked. (Page 431 of *The Law of Company Liquidation* by B.H. McPherson).

14. And on these considerations of the law, and with the view of preventing injustice and any abuse of the Court process, I grant an order in terms of the 1st and 2nd defendant's summons-in-chambers application dated 26 March 1991 to stay the suit with costs.

Also found at [1991] 3 CLJ 2238